

1 Scott D. Cunningham (State Bar No.: 200413)
CONDON & FORSYTH LLP
2 1901 Avenue of the Stars, Suite 850
Los Angeles, California 90067-6010
3 Telephone: (310) 557-2030
Facsimile: (310) 557-1299
4 Email: scunningham@condonlaw.com

5 -and-

6 Marshall S. Turner (*pro hac vice*)
CONDON & FORSYTH LLP
7 7 Times Square
New York, NY 10036
8 Telephone: (212) 490-9100
Facsimile: (212) 370-4453
9 Email: mturner@condonlaw.com

10 Attorneys for Plaintiff and Counter-Defendant
ALL NIPPON AIRWAYS COMPANY, LTD.
11

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 ALL NIPPON AIRWAYS COMPANY,)
LTD.,)

15 Plaintiff,

16 vs.

17 UNITED AIR LINES, INC.,)

18 Defendant.)

Case No. C07-03422 EDL

**ALL NIPPON AIRWAYS
COMPANY, LTD.'S NOTICE OF
MOTION FOR PROTECTIVE
ORDER**

**Hearing Date: December 18, 2007
Hearing Time: 9:00 a.m.
Hearing Place: Courtroom of Hon.
Elizabeth D. Laporte**

19 AND RELATED COUNTER-CLAIM
20

21 Plaintiff and Counter-Defendant, ALL NIPPON AIRWAYS COMPANY,
22 LTD. (hereinafter referred to as "ANA"), by and through its attorneys, Condon &
23 Forsyth LLP, hereby gives notice that the instant Motion for Protective Order will
24 come for hearing in the courtroom of the Honorable Elizabeth D. Laporte on
25 December 18, 2007 at 9 a.m.

26 Plaintiff ANA hereby moves this Court to exercise its broad discretion under
27 Rule 26 to issue a protective order: (1) ordering that the deposition of a
28 representative of ANA with respect to the Standard Ground Handling Agreement

1 not be had; or, alternatively, (2) ordering that the deposition of the representative
2 of ANA with respect to the Standard Ground Handling Agreement must be held in
3 Japan.

4 The Motion will be based upon this Notice of Motion, the Memorandum of
5 Points and Authorities, the Declaration of Marshall S. Turner, all papers on file
6 herein, and any oral argument offered at the hearing.

7 Dated: November 9, 2007 CONDON & FORSYTH LLP

8
9 By: 
10 MARSHALL S. TURNER (*pro hac vice*)
SCOTT D. CUNNINGHAM

11 Attorneys for Plaintiff
12 ALL NIPPON AIRWAYS COMPANY, LTD.
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT.....	5
I. GOOD CAUSE EXISTS AND JUSTICE REQUIRES THAT THE COURT ISSUE A PROTECTIVE ORDER PURSUANT TO RULE 26 OF THE FEDERAL RULES OF CIVIL PROCEDURE THAT THE DEPOSITION MAY NOT BE HAD FROM AN ANA WITNESS CONCERNING THE SGHA.....	5
A. Good Cause Exists For A Protective Order Where, As Here, The Discovery Sought Is Irrelevant.....	6
B. Good Cause Exists For A Protective Order Where, As Here, A Witness Who Resides And Works In A Foreign Jurisdiction Has Been Noticed For Deposition In The Forum State.....	13
CONCLUSION	17

TABLE OF AUTHORITIES

Federal Statutes

Federal Rule of Civil Procedure 1	14, 15
Federal Rule of Civil Procedure 15	4
Federal Rule of Civil Procedure 26	3, 5, 6, 14, 15, 17
Federal Rule of Civil Procedure 30	2
Federal Rule of Civil Procedure 37	5

Local Rules

Federal Rule of Civil Procedure 37-1	5
--	---

Federal Cases

<i>Armstrong Cork Co., v. Niagra Mohawk Power Corp.</i> , 16 F.R.D. 389 (S.D.N.Y. 1954)	15
<i>Beckman Indus., Inc. v. Int'l Ins. Co.</i> , 966 F.2d 470 (9th Cir. 1992).....	6
<i>Chris-Craft Indus. Products, Inc. v. Kuraray Co., Ltd.</i> , 184 F.R.D. 605 (N.D. Ill. 1999).....	14
<i>Coyle v. P.T. Garuda Indonesia</i> , 363 F. 3d 979 (9th Cir. 2004).....	9
<i>Dwelly v. Yamaha Motor Corp.</i> , 214 F.R.D. 537 (D. Minn. 2003).....	14
<i>Gulf Oil Co. v. Bernard</i> , 452 U.S. 89 (1981).....	6
<i>In re Aircrash Disaster Near Cerritos, Cal., August 31, 1986</i> , 1989 WL 330820 (C.D.Cal. 1989).....	12, 13
<i>In re Greenwood Air Crash</i> , 924 F. Supp. 1518 (S.D.Ind. 1995)	12
<i>Mgmt. Activities, Inc. v. U.S.</i> , 21 F. Supp. 2d 1157 (C.D.Cal. 1998).....	12
<i>Rodriquez v. U.S.</i> , 823 F.2d 735 (3d Cir. 1987).....	12
<i>Seattle Times Co. v. Rhinehart</i> , 467 U.S. 20 (1984).....	6, 15
<i>Six West Retail Acquisition, Inc. v. Sony Theatre Manag. Corp.</i> , 203 F.R.D. 98 (S.D.N.Y. 2001).....	14
<i>Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa</i> , 482 U.S. 522, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987).....	15, 16

1	<i>Thomas v. Int'l Bus. Machines</i> , 48 F.3d 478 (10th Cir. 1995).....	14
2	<i>Wyler Summit P'ship v. Turner Broad. Sys., Inc.</i> , 135 F.3d 658 (9th Cir. 1998)...	11
3		
4	<u>Other Authorities</u>	
5	ASIC GLOSSARY OF TERMS AND DEFINITIONS.....	8
6	FAA Order 7110.65 - Air Traffic Control Manual §§ 2-1-2, 2-1-6,	
7	2-1-21, 5-1-8	12
8	NATO GLOSSARY OF TERMS AND DEFINITIONS.....	9
9	<i>Tactical Use and Abuse of Depositions under the Federal Rules</i> ,	
10	59 Yale L.J. 117 (1949)	15

CONDON & FORSYTH LLP
 1901 Avenue of the Stars, Suite 850
 Los Angeles, California 90067-6010
 Telephone: (310) 557-2030

STATEMENT OF ISSUES TO BE DECIDED

I WHETHER THIS COURT SHOULD ISSUE A PROTECTIVE ORDER PROHIBITING THE DEPOSITION OF AN ALL NIPPON AIRWAYS CO., LTD. EMPLOYEE CONCERNING THE STANDARD GROUND HANDLING AGREEMENT BECAUSE THE AGREEMENT IS NOT RELEVANT TO THIS CASE

II WHETHER THIS COURT SHOULD ISSUE A PROTECTIVE ORDER DIRECTING THAT THE DEPOSITION OF AN ALL NIPPON AIRWAYS CO., LTD. EMPLOYEE CONCERNING THE STANDARD GROUND HANDLING AGREEMENT TAKE PLACE WHERE THE WITNESS RESIDES AND IS EMPLOYED

1 Scott D. Cunningham (State Bar No.: 200413)
CONDON & FORSYTH LLP
2 1901 Avenue of the Stars, Suite 850
Los Angeles, California 90067-6010
3 Telephone: (310) 557-2030
Facsimile: (310) 557-1299
4 Email: scunningham@condonlaw.com

5 -and-

6 Marshall S. Turner (*pro hac vice*)
CONDON & FORSYTH LLP
7 7 Times Square
New York, NY 10036
8 Telephone: (212) 490-9100
Facsimile: (212) 370-4453
9 Email: mturner@condonlaw.com

10 Attorneys for Plaintiff and Counter-Defendant
ALL NIPPON AIRWAYS COMPANY, LTD.
11

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 ALL NIPPON AIRWAYS COMPANY,) LTD.,
15

Plaintiff,

16 vs.

17 UNITED AIR LINES, INC.,

18 Defendant.
19

Case No. C07-03422 EDL

MOTION FOR PROTECTIVE ORDER

Hearing Date: December 18, 2007

Hearing Time: 9:00 a.m.

Hearing Place: Courtroom of Hon.
Elizabeth D. Laporte

20 AND RELATED COUNTER-CLAIM

21 Plaintiff and Counter-Defendant, ALL NIPPON AIRWAYS COMPANY,
22 LTD. (hereinafter referred to as "ANA"), by and through its attorneys, Condon &
23 Forsyth LLP, hereby submits its Motion for Protective Order as follows:

24 **INTRODUCTION**

25 ANA is seeking a Protective Order to prohibit the taking of a deposition of
26 ANA's "Person Most Knowledgeable" (hereinafter referred to as "PMK") with
27 regard to a certain agreement between ANA and Defendant United Air Lines, Inc.
28 (hereinafter referred to as "UAL"), because it is clear on the face of the agreement

1 that the agreement has no relevance to any issue in this case.

2 This action arises out of an accident involving ANA Flight NH007 and UAL
3 Flight UA809 at San Francisco International Airport on October 7, 2003 (“the
4 Accident”). A collision occurred between the two aircraft while ANA Flight
5 NH007 was taxiing under its own power along the centerline of Taxiway A.
6 During the taxi, ANA Flight NH007’s right wing collided with the right wing of
7 UAL Flight UA809, which had been pushed back from its gate so that its wing
8 intruded into the path of Flight ANA NH007.

9 UAL alleges in its Counter-Complaint that ANA has breached the Standard
10 Ground Handling Agreement (variously referred to herein as “SGHA” or “GHA”)
11 between the two airlines, “by refusing and/or failing to indemnify UAL for the
12 damages that UAL’s aircraft sustained in the collision complained of herein.”
13 Counter-Complaint, ¶ 27; First Amended Counter-Complaint, ¶ 27. UAL further
14 alleges that pursuant to the SGHA, any liability of UAL to ANA should be capped
15 at \$1.5 million. Counter-Complaint, ¶ 27; First Amended Counter-Complaint, ¶
16 35. UAL attached three documents (3) to its Counter-Complaint upon which it
17 bases its allegations. The Main Agreement and Annex A were signed by UAL on
18 July 23, 1991 and by ANA on August 14, 1991; and Annex B is dated September
19 25, 2001 (collectively referred to herein as the “1991 SGHA”).

20 On September 27, 2007, UAL served ANA with deposition notices and
21 document requests for the three ANA pilots on board Flight NH007 at the time of
22 the Accident as well as a deposition notice for the PMK concerning the 1991
23 SGHA pursuant to FRCP 30(b)(6). Declaration of Marshall S. Turner (“Turner
24 Decl.”), Exhibit A. ANA promptly informed UAL that no witness would be
25 provided concerning the SGHA unless UAL were to provide some basis for
26 requiring such a witness.

27 In its letter of August 30, 2007, ANA advised UAL that “it is clear on the
28

1 face of the GHA referred to in and attached to United's Counter-Complaint [the
2 1991 SGHA] that the GHA could not possibly have anything to do with any issue
3 in this case," and that ANA has "no intention of bringing any ANA witness to the
4 U.S. on this subject until United establishes some basis for this affirmative
5 defense." Turner Decl., Exhibit B. ANA noted:

6 [I]f United is serious about asserting the GHA as an
7 affirmative defense, ANA would be entitled to ascertain
8 the nature and basis of this claim before providing a
9 corporate witness to testify on the subject. Please
10 describe the nature and basis of this defense and how the
referenced document could possibly apply to any fact at
issue in this case.

11 Turner Decl., Exhibit B.

12 UAL offered no response.

13
14 The parties conducted a telephonic Rule 26(f) conference on September 10,
15 2007, during which UAL requested a deposition of a witness with knowledge of
16 the SGHA. ANA again informed UAL that it would not agree to the production of
17 such a witness unless UAL could explain how the 1991 SGHA could possibly be
18 related to the Accident. ANA again advised UAL in its letter of September 14,
19 2007:

20 [N]o such witness will be provided unless you can
21 explain how the Ground Handling Agreement referred to
22 in and attached to your Counter-Complaint could have
23 any relevance to any issue in this case and why any
question regarding this agreement cannot be answered
through interrogatories or admissions.

24 Turner Decl., Exhibit C.

25 UAL again provided no explanation in response to this request.

26 In its letter of September 28, 2007, ANA:
27
28

- 1 1. Provided UAL with copies of the agreements that were in effect on the
2 date of the Accident (collectively referred to herein as the "2002
3 SGHA") ; see Turner Decl., Exhibit D, ¶ 3;
- 4 2. Explained how ANA's claim was against UAL's Ramp Controller for
5 his negligence related to the premature release of UAL 809 and was not
6 related to any service provided to ANA under the SGHA; see Turner
7 Decl., Exhibit D, ¶ 8;
- 8 3. Invited UAL to come forward with any information contrary to ANA's
9 position; see Turner Decl., Exhibit D, ¶ 10; and
- 10 4. Invited UAL to amend its Answer and Counter-Complaint to delete
11 Counts Three and Four; see Turner Decl., Exhibit D, ¶ 10.

12 See Turner Decl., Exhibit D.

13 UAL provided no response. UAL filed a motion to compel production of
14 the PMK in which UAL concedes that the 1991 SGHA attached to its Counter-
15 Complaint was not in effect at the time of the Accident. UAL subsequently filed a
16 First Amended Counter-Complaint wherein it does not delete Counts Three and
17 Four, but rather bases its allegations concerning the SGHA on different agreements
18 than those attached to its Counter-Complaint. In its First Amended Counter-
19 Complaint, UAL bases its claims on the 2002 SGHA provided by ANA that was in
20 effect at the time of the Accident. However, UAL did not move for leave to file its
21 amended pleading. Despite UAL's assertion in its motion to compel that the Court
22 agreed to "permit" the filing, there is no order or ruling to support UAL's position.
23 At the Initial Case Management Conference on October 2, 2007, counsel for ANA
24 informed the Court he had invited UAL to withdraw the 1991 SGHA documents
25 attached to its Counter-Complaint and to withdraw Counts Three and Four of its
26 Counter-Complaint, but ANA has never consented to any amendment as claimed
27 by UAL nor had the Court agreed. Pursuant to FRCP Rule 15, a party may amend
28 its pleading "only by leave of court or by written consent of the adverse party."

1 UAL has secured neither. This Court's Case Management And Pretrial Order For
 2 Jury Trial dated October 18, 2007 mandates that, "[t]he last day to file a motion, or
 3 stipulation and proposed order, to join other parties, or amend the pleadings shall
 4 be October 31, 2007." UAL failed to adhere to this mandate when it filed its First
 5 Amended Complaint without a motion or stipulation.

6 Pursuant to FRCP 37 and L.R. 37-1, ANA made a good faith attempt to
 7 confer with UAL to resolve this issue without court action. In its letter of
 8 November 8, 2007, ANA requested that UAL have a good faith conference to
 9 discuss the same. See Turner Decl., Exhibit E. On November 9, 2007, ANA and
 10 UAL conducted a teleconference during which UAL refused to withdraw its
 11 request for a deposition of a representative of ANA with respect to the SGHA.

12 Unfortunately, the dispute remains unresolved and ANA has filed this
 13 motion to seek the assistance of the Court. ANA respectfully submits that good
 14 cause exists for this Court to issue a protective order prohibiting the deposition of
 15 an ANA witness with respect to the SGHA pursuant to Rule 26 of the Federal
 16 Rules of Civil Procedure.

17 ARGUMENT

18 I

19 **GOOD CAUSE EXISTS AND JUSTICE REQUIRES THAT THE COURT** 20 **ISSUE A PROTECTIVE ORDER PURSUANT TO RULE 26 OF THE** 21 **FEDERAL RULES OF CIVIL PROCEDURE THAT THE DEPOSITION** 22 **MAY NOT BE HAD FROM AN ANA WITNESS CONCERNING THE** 23 **SGHA**

24 A protective order should be issued to prevent the deposition of ANA's
 25 PMK regarding the SGHA. The express wording of the SGHA does not support
 26 UAL's tenuous allegations.

27 Rule 26 of the Federal Rules of Civil Procedure states, in pertinent part, that:

28 for good cause shown, the court in which the action is
 pending . . . may make any order which justice requires to
 protect a party or person from annoyance, embarrassment,

1 oppression, or undue burden or expense, including one or
2 more of the following:

- 3 (1) that the disclosure or discovery not be had...
4 (4) that certain matters may not be inquired into...

5 FED. R. CIV. P. 26(C) (West 2007).

6 The United States Supreme Court has interpreted the language of Rule 26 as
7 conferring "broad discretion on the trial court to decide when a protective order is
8 appropriate and what degree of protection is required." *Seattle Times Co. v.*
9 *Rhinehart*, 467 U.S. 20, 36 (1984).

10 The party seeking a protective order has the burden of showing that "good
11 cause" for the order exists. *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470,
12 476 (9th Cir. 1992). To establish good cause, the moving party must submit "a
13 particular and specific demonstration of fact, as distinguished from stereotyped and
14 conclusory statements." *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) (internal
15 quotation and citation omitted).

16 As set forth particularly and specifically by ANA below, ANA respectfully
17 submits that good cause exists and justice requires that this Court exercise its broad
18 discretion under Rule 26 and issue a protective order requiring that the deposition
19 of an ANA witness with knowledge of the SGHA may not be had and that this
20 issue may not be inquired into unless UAL can establish at least a modicum of
21 relevance to the Accident.

22
23 **A. Good Cause Exists For A Protective Order Where, As Here, The**
24 **Discovery Sought Is Irrelevant**

25 Clearly, the 1991 SGHA upon which UAL based its Counter-Complaint and
26 its deposition notice cannot possibly have any relevance to this 2003 Accident and
27 ANA should not be required to produce a PMK regarding such documents.
28

1 Additionally, no service was being provided by UAL to ANA under the
 2 2002 SGHA at the time of the Accident. UAL refers to sections 4.2 and 4.3 of
 3 Annex B to the 2002 SGHA to support its allegations. First Amended Counter-
 4 Complaint, ¶¶ 24, 32. Section 4.2 of Annex B to the 2002 SGHA applies to, “any
 5 and all liabilities... in any manner arising out of or in any way connected with the
 6 services furnished or to be furnished by Handling Company under this
 7 Agreement.” Section 4.3 of Annex B to the 2002 SGHA applies to, “any and all
 8 liabilities... in any manner arising out of or in any way connected with goods or
 9 services furnished or to be furnished by Handling Company under this
 10 Agreement.” As illustrated below, no service under the 2002 SGHA was being
 11 furnished by UAL to ANA at the time of the Accident.

12 UAL also alleges that services were being provided to ANA under section
 13 6.1.1 of Annex A to the 2002 SGHA. First Amended Counter-Complaint, ¶¶ 23,
 14 26, 31, 33. Annex B sets forth the services to be furnished under the 2002 SGHA.

15 The applicable Annex B, valid from September 25, 2002, states:

16 1.1 For a single ground handling consisting of the
 17 arrival and subsequent departure at agreed timings
 18 of the same aircraft, the Handling Company [UAL]
 19 shall provide the following services of Annex A of
 the SGHA of April 1998:

20 1.1.1 Section 6. Ramp

21 6.1.1

22 6.2.1, 6.2.2 (on request), 6.2.3 (on request;
 additional charges apply)

23 6.3.1, 6.3.2(a)(b)

24 6.5.1(a)(b)(c) (on request; additional
 charges apply)

25 6.6.1

26 6.7.1(a)(b)(c)(d)(e)

27 To see what these services are, it is necessary to refer to Annex A, Section 6.
 28 However, none of the services listed under Section 6 of Annex A were being
 provided to ANA at the time of the Accident nor were the damages “connected
 with” or “arising out of” a service provided by UAL under the 2002 SGHA

1 pursuant to Sections 4.2 and 4.3 of the 2002 SGHA. Section 6.1 of the applicable
 2 Annex A provides in its entirety:

- 3 6.1 Marshalling
 4 6.1.1 (a) Provide
 or
 5 (b) Arrange for
 6 Marshalling at arrival or departure

7 Section 6.1.1 only provides for “Marshalling at arrival and or departure.”
 8 Without providing any legal or factual basis, UAL argues in its Motion to Compel
 9 that the services provided by UAL’s Ramp Controller constitute “marshalling.”
 10 UAL’s attempt to suggest that a Ramp Controller, sitting in a tower more than fifty
 11 feet above the ground, who admittedly did not see ANA’s airplane when he was
 12 communicating with its crew after it departed the parking area at Gate G 95, was
 13 performing “marshalling” services under the SGHA is without factual support or
 14 any basis in reality. Likewise, none of the other contracted for services listed in
 15 Annex B and described in Section 6 of Annex A were being provided at the time of
 16 the Accident. The “parking” services of Section 6.2, if provided at all, had long
 17 since ceased at the time of the Accident. The services provided by UAL pursuant
 18 to Section 6.3 of the 2002 Annex A were:

- 19 6.3.1 Provide headsets.
 20 6.3.2 Perform ramp to flight deck communication
 (a) during tow-in and/or push-back.
 21 (b) during engine starting.

22 Here again, none of these services were being provided to ANA by UAL at the
 23 time of the Accident and ANA had completed “push-back” and “engine starting.”
 24 At the time of the Accident, ANA was taxiing under its own power long after UAL
 25 provided any service under the SGHA. UAL’s reference in its Reply in Support of
 26 Motion to Compel to the “for other purposes” wording in Annex A Section
 27 6.3.2(c), is clearly omitted from the list of contracted for services delineated by
 28

1 Annex B. Thus, none of the services agreed to by ANA and UAL were being
2 provided under the 2002 SGHA at the time of the Accident nor gave rise to the
3 damages.

4 With respect to “marshalling,” UAL argues in its Reply in Support of
5 Motion to Compel that it “has shown that the common dictionary definition of the
6 term applies to the type of services ANA alleges that United negligently provided.
7 One is permitted to refer to dictionary definitions when construing contractual
8 terms.” This is disingenuous. UAL pulled a couple words out of context from the
9 general dictionary definition of “marshalling” to fit its arguments. However, this
10 term is being used in an aviation context and must be defined accordingly. UAL’s
11 citation to *Coyle v. P.T. Garuda Indonesia*, 363 F. 3d 979, 988 (9th Cir. 2004) to
12 support its use of a dictionary definition is misguided. That case likens such use to
13 “evidence of trade usage,” which is more appropriate given the aviation context.
14 *Id.* The trade usage definition of marshalling in aviation is contrary to UAL’s
15 allegations.

16 It is common knowledge in aviation that “marshalling” is a function of
17 someone on the ground, such as a wing walker or guide, guiding an aircraft with
18 visual signals, like those shown in the Federal Aviation Administration (“FAA”)
19 Aeronautical Information Manual Section 4-3-25. See Turner Decl., Exhibit F.
20 For UAL’s counsel to argue that a controller in a tower high above the ground with
21 no visual contact with the departing aircraft far from its parking area constituted
22 marshalling is disingenuous at best. The Air and Space Interoperability Council,
23 an international organization working in conjunction with its member nations’
24 respective air forces, defines “aircraft marshalling” as, “The directing by visual or
25 other signaling of the taxiing of aircraft into predesignated positions. Also called
26 aircraft parking.” ASIC GLOSSARY OF TERMS AND DEFINITIONS. See Turner Decl.,
27 Exhibit G. The North Atlantic Treaty Organization defines “aircraft marshaller”
28

1 as, "A person trained to direct by visual or other means the movement of aircraft
2 on the ground into and out of landing, parking or hovering points." It also notes
3 that this definition applies to the term "aircraft guide." NATO GLOSSARY OF
4 TERMS AND DEFINITIONS. See Turner Decl., Exhibit H.

5 This is consistent with UAL's own training manual for "guidepersons." See
6 "Ramp Services Trainer Aircraft Guideperson & Wingwalker," Turner Decl.,
7 Exhibit I. UAL's training manual shows the hand signals and wand positions to be
8 used when guiding aircraft on the ground. Moreover, this same UAL document
9 uses "Marshall" and "guideperson" synonymously when it states, "A Marshall or
10 guideperson is required for *all* aircraft arrivals." Turner Decl., Exhibit I, Receipt
11 and Dispatch Summary – 1. UAL has provided no rule or definition by any
12 aviation organization that resembles the definition it attempted to fabricate from
13 Mr. Webster's dictionary.

14 Furthermore, at the time of the Accident, UAL's Ramp Controller was
15 performing FAA functions with respect to communications with inbound and
16 outbound aircraft, not services provided under any SGHA with any airline.
17 Pursuant to agreements, unrelated to any SGHA, these FAA functions were
18 delegated to UAL. In an agreement between the FAA and San Francisco Terminal
19 Equipment Co. ("SFOTEC"), the FAA delegated responsibility for the operation of
20 Ramp Tower G to SFOTEC. See Turner Decl., Exhibit J. In an agreement
21 between SFOTEC and UAL, SFOTEC transferred such responsibility to UAL. See
22 Turner Decl., Exhibit K. It is clear under these agreements, which delineate duties
23 in connection with the operation of Ramp Tower G and establish procedures for
24 arriving and departing aircraft, that the Ramp Controller services were provided to
25 all airlines regardless of whether they entered into an SGHA with UAL, including
26 UAL's rival American Airlines whose planes operated in the Tower G area. In
27 accordance with the FAA and SFOTEC agreements, the Ramp Controller
28

1 operating in Ramp Tower G at the time of the Accident was a UAL employee who
2 was performing FAA functions which had been delegated first to SFOTEC and
3 then to UAL. None of these duties were performed under an SGHA.

4 UAL misconstrues the FAA/SFOTEC/UAL agreements in its Reply in
5 Support of Motion to Compel. UAL misstates ANA's position by proffering that
6 ANA's contention is that the MOU with SFOTEC "somehow supersede[s] the
7 terms of the SGHA and its Annexes." In accordance with the foregoing, this is
8 obviously not the case. ANA does not contend that the aforementioned agreements
9 "supersede" the SGHA, but rather that they establish that any service that may
10 have been provided to ANA by UAL's Ramp Controller after it left the engine
11 starting area would have been an FAA function pursuant to these agreements and
12 distinct from any service set forth in the SGHA. Furthermore, UAL's argument
13 concerning the modification of a contract is baseless. UAL cites to the dissent in
14 *Wylar Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658 (9th Cir. 1998),
15 which sets no precedent for this Court. In any event, the terms of the foregoing
16 FAA/SFOTEC/UAL agreements in no way modify the SGHA because the services
17 involved are distinct from those covered by the SGHA.

18 The functions delineated in the FAA agreement with SFOTEC and in the
19 SFOTEC agreement with UAL to operate the Ramp Tower G clearly do not
20 involve any realistic definition of "marshalling." UAL has extracted a few
21 selective words from a Webster's dictionary, but has offered no factual or legal
22 support for its contrived definition of "marshalling." UAL's own Ramp Services
23 Trainer manual contradicts this definition by using "marshall" and "guideperson"
24 synonymously. UAL has provided no affidavit from its Ramp Controller or
25 anyone with knowledge of aviation terminology to support its position that the
26 Ramp Controller's radio contact from his tower was providing "marshalling" or
27 any other service under the SGHA.
28

1 No marshalling of Flight NH007 was taking place at the time of the
 2 collision, which was moving under its own power far from its parking gate
 3 pursuant to clearances from UAL Ramp Control and the FAA controller in the
 4 FAA Air Traffic Control Tower. There was no one on the ground guiding or
 5 signaling NH007. Accordingly, no service was being provided to ANA under
 6 section 6.1 of the SGHA at the time of the Accident or under any other SGHA
 7 provision.

8 UAL argues in its Reply in Support of Motion to Compel that ANA has
 9 alleged that “United’s negligence arose out of providing marshalling services that
 10 United’s ramp controller provided to ANA” and that this serves as a basis for
 11 deposing the PMK. See UAL’s Reply in Support of Motion to Compel, p. 6. This
 12 statement is simply untrue. Nowhere in its pleadings has ANA used the word
 13 “marshalling” or any derivative thereof. ANA has alleged that UAL’s Ramp
 14 Controller’s actions or omissions were negligent because UAL’s Ramp Controller
 15 released UAL’s Flight UA809 prematurely so as to interfere with ANA’s Flight
 16 NH007’s taxi and a general failure to fulfill the responsibilities of an FAA
 17 controller. See Complaint, ¶¶ 33-52. The allegations made by ANA with respect
 18 to UAL’s Ramp Controller were made regarding duties and obligations of the
 19 Ramp Controller under the law and not in connection to “marshalling” or any
 20 service provided by UAL to ANA under the SGHA.

21 An air traffic controller’s duties to pilots are defined by FAA Order 7110.65
 22 – the Air Traffic Control Manual (“ATCM”) – and common law. *In re Greenwood*
 23 *Air Crash*, 924 F. Supp. 1518, 1535 (S.D.Ind. 1995). The duties delineated in the
 24 allegations made by ANA in its Complaint with respect to UAL’s Ramp Controller
 25 are established by such law. See ATCM §§ 2-1-2, 2-1-6, 2-1-21, 5-1-8; *Mgmt.*
 26 *Activities, Inc. v. U.S.*, 21 F. Supp. 2d 1157 (C.D.Cal. 1998); *Greenwood Air*
 27 *Crash, supra*; *Rodriguez v. U.S.*, 823 F.2d 735 (3d Cir. 1987); *In re Aircrash*
 28

1 *Disaster Near Cerritos, Cal., August 31, 1986*, 1989 WL 330820 (C.D.Cal. 1989).

2 UAL also argues in its Reply in Support of Motion to Compel that ANA
 3 “improperly focuses on the term ‘marshalling’ to the exclusion of other SGHA
 4 terms and provisions that arguably apply to United’s counter-claims.” However,
 5 the sole service under the SGHA alleged by UAL in its First Amended Counter-
 6 Complaint is section 6.1.1, which provides for marshalling. First Amended
 7 Counter-Complaint, ¶¶ 23, 31. UAL fails to include allegations in its pleadings
 8 concerning other “terms and provisions that arguably apply to United’s counter-
 9 claims.”

10 UAL’s Reply in Support of Motion to Compel makes the tenuous argument
 11 that sections 10.1.3 and 10.2.8 and “still other provisions” of Annex A of the
 12 SGHA apply to this matter. However, these provisions were never raised by any
 13 party in this matter until UAL’s Reply and UAL provided no basis for these
 14 provisions to have any application to this case. Moreover, these sections are not
 15 listed under the services contracted for in Annex B of the 2002 SGHA. Since
 16 ANA has effectively refuted UAL’s “marshalling” argument, the sole provision
 17 alleged by UAL’s pleadings, UAL now makes a feeble attempt to fabricate an
 18 alternate avenue to implicate the SGHA. UAL is trying to hypothesize any
 19 provision about which a claim could potentially be made while no claim has been
 20 made about any such provision. UAL is in effect endeavoring to replead for ANA
 21 to bring the SGHA into play. UAL has no factual or legal basis to do so. UAL’s
 22 position is so untenable that it is trying to amend the pleadings in reply papers to
 23 make issues relevant that neither party has plead or even suggested. It is
 24 respectfully submitted that such arguments should be disregarded by this Court.

25 //

26 //

27 //

28

B. Good Cause Exists For A Protective Order Where, As Here, A Witness Who Resides And Works In A Foreign Jurisdiction Has Been Noticed For Deposition In The Forum State

UAL's deposition notice states that the location of the deposition is Los Angeles, California. Although ANA has volunteered to produce its flight crew for depositions in California, the proper place for the deposition of a corporate employee is at the employee's place of business or residence, which in this case is Japan. *Six West Retail Acquisition, Inc. v. Sony Theatre Manag. Corp.*, 203 F.R.D. 98, 107 (S.D.N.Y. 2001); *Dwelly v. Yamaha Motor Corp.*, 214 F.R.D. 537 (D. Minn. 2003); *Thomas v. Int'l Bus. Machines*, 48 F.3d 478 (10th Cir. 1995).

The court in *Chris-Craft Indus. Products, Inc. v. Kuraray Co., Ltd.*, 184 F.R.D. 605, 607 (N.D. Ill. 1999) held that depositions of Japanese executives must be taken in Japan because, "[w]hen a corporation objects to a deposition being taken at a place other than its principal place of business, 'the objection should be sustained unless there are unusual circumstances which justify such an inconvenience to the corporation.'" The court in *Chris-Craft* also noted that there is a "presumption that the corporation has good cause for a protective order." *Chris-Craft, supra*, 184 F.R.D. at 607.

Furthermore, ANA respectfully submits that pursuant to Federal Rules of Civil Procedure Rule 1 and Rule 26, justice requires that the Court issue an order protecting ANA and its corporate employees from annoyance, embarrassment, oppression and undue burden. Rule 26 provides that a court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense..." FED. R. CIV. PROC. 26 (West 2007).

Rule 1 requires that the Federal Rules of Civil Procedure, including Rule 26, should be "construed and administered to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1 (West 2007). Thus, the Advisory Committee observed that there is an "affirmative duty of the court to exercise the

1 authority conferred by these rules to ensure that civil litigation is resolved not only
2 fairly, but also without undue cost or delay.” Advisory Committee Notes Rule 1,
3 1993 Amendment.

4 Within this framework, the United States Supreme Court instructed in
5 *Seattle Times Co. v. Rhinehart* that:

6 Because of the liberality of pretrial discovery permitted
7 by Rule 26(b)(1), it is necessary for the trial court to have
8 the authority to issue protective orders conferred by Rule
9 26(c). It is clear from experience that pretrial discovery
by depositions . . . has a significant potential for abuse.

10 *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 28, 81 L. Ed.2d 17, 104 S. Ct. 2199
11 (1984).

12 Although the federal discovery rules are very liberal, one federal district
13 court has stated that:

14 [t]he court should be alert to see that the liberal deposition
15 procedure provided in the Federal Rules is used only for
16 the purpose for which it is intended and is not used as a
17 litigation tactic to harass the other side or cause it
wasteful expense.

18 *Armstrong Cork Co., v. Niagra Mohawk Power Corp.*, 16 F.R.D. 389, 390-91
19 (S.D.N.Y. 1954), *citing*, *Tactical Use and Abuse of Depositions under the Federal*
20 *Rules*, 59 Yale L.J. 117 (1949).

21 The United States Supreme Court, in *Societe Nationale Industrielle*
22 *Aerospatiale v. United States District Court for the Southern District of Iowa*,
23 considered the potential for abuse of the liberal discovery procedures implemented
24 by the courts in the United States where foreign litigants are involved. The
25 Supreme Court held that:

26 American courts, in supervising pretrial proceedings,
27 should exercise special vigilance to protect foreign
28 litigants from the danger that unnecessary, or unduly

1 burdensome, discovery may place them in a
2 disadvantageous position. Judicial supervision of
3 discovery should always seek to minimize its costs and
4 inconvenience and to prevent improper uses of discovery
5 requests. When it is necessary to seek evidence abroad,
6 however, the district court must supervise pretrial
7 proceedings particularly closely to prevent discovery
8 abuses. For example, the additional cost of transportation
9 of documents or witnesses to or from foreign locations
10 may increase the danger that discovery may be sought for
the improper purpose of motivating settlement, rather
than finding relevant and probative evidence. Objections
to “abusive” discovery that foreign litigants advance
should therefore receive the most careful consideration.

11 *Societe Nationale Industrielle Aerospatiale v. United States District Court for the*
12 *Southern District of Iowa*, 482 U.S. 522, 546, 107 S. Ct. 2542, 2557, 96 L. Ed. 2d
13 461,485(1987).

14 Nowhere in its motion does UAL indicate what light an ANA PMK might
15 shed on UAL’s claim that its Ramp Controller provided a marshalling service or
16 any other service under the SGHA. As an IATA form agreement, used by almost
17 all international airlines, the only negotiation was monetary. The IATA terms are
18 standard provisions used by airlines all over the world and no negotiation or
19 discussion of the interpretation of the wording contained therein is necessary.
20 UAL knows full well that there was no negotiation of the interpretation of term
21 marshalling or any other term. All negotiations concerning the SGHA in effect at
22 the time of the Accident took place via email with the ANA negotiator sitting at his
23 computer in Tokyo and the UAL negotiator sitting at his computer in Illinois. See
24 Turner Decl., Exhibit L.

25 Since ANA is organized and exists under the laws of Japan with its principle
26 place of business in Japan and the corporate employee who signed the SGHA
27 resides and works in Japan and executed the SGHA in Japan, if a witness is to be
28

1 produced on the subject of the SGHA, the appropriate place for such a deposition is
2 in Japan.

4 CONCLUSION

5 In light of the foregoing, ANA respectfully submits that it has particularly
6 and specifically shown that good cause exists and justice requires that this Court
7 exercise its broad discretion under Rule 26 and issue a protective order (1)
8 prohibiting the deposition of a representative of ANA with respect to the SGHA; or,
9 alternatively, (2) requiring that a deposition of a PMK concerning the SGHA must
10 be held in Japan.

11 Dated: November 9, 2007

CONDON & FORSYTH LLP

12
13 By: 

MARSHALL S. TURNER (*pro hac vice*)
SCOTT D. CUNNINGHAM

15 Attorneys for Plaintiff
16 ALL NIPPON AIRWAYS COMPANY, LTD.

CERTIFICATE OF SERVICE

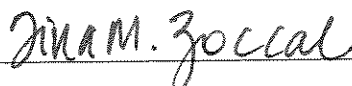
ALL NIPPON AIRWAYS' MOTION FOR PROTECTIVE ORDER

I, hereby certify that on November 9, 2007 I electronically filed the foregoing paper with the Clerk of the Court using the ECF System which will send notification of such filing to the following:

Scott R. Torpey, Esq. Jaffe, Raitt, Heuer & Weiss 2777 Franklin Road, Suite 2500 Southfield, MI 48034-8214 Phone: (248) 727-1461 Fax: (248) 351-3082	Attorneys for defendant
Jeffrey A. Worthe, Esq. Worthe, Hanson & Worthe The Xerox Centre 1851 East First Street, Ninth Floor Santa Ana, CA 92705	Attorneys for defendant


 HEATHER L. JACKSON

Sworn to before me this
 9th day of November, 2007



Notary Public

TINA M. ZOCCALI
 Notary Public, State of New York
 No. 01ZO6059025
 Qualified in Rockland County
 Commission Expires May 21, 20 11

-18-